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No. 34321-5-II

COURT OF APPEALS,
DIVISION II OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFFS GUILD, DEPUTY BRIAN LA FRANCE AND JANE DOE LA FRANCE, AND THE MARITAL COMMUNITY COMPOSED THEREOF, ***APPELLANTS/CROSS-RESPONDENTS,***

VS.

KITSAP COUNTY AND KITSAP COUNTY SHERIFF,
RESPONDENTS/CROSS-APPELLANTS.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY, CAUSE NO. 04-2-14643-2

JOINT REPLY BRIEF OF APPELLANTS/JOINT RESPONSE BRIEF OF CROSS-RESPONDENTS

George E. Merker
CLINE & ASSOCIATES

1001 Fourth Avenue, Suite 2301
Seattle, WA 98154
206/838-8770
Attorneys for Appellant Guild

DEPUTY BRIAN LA FRANCE and JANE DOE LA FRANCE, and the marital community composed thereof

Pro Se
c/o Cline & Associates
1001 Fourth Avenue, Suite 2301
Seattle, WA 98154
206/838-8770

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STATEMENT OF THE CASE

Appellants/Cross Respondents' object to the apparent effort by the Respondents to complicate this case by, among other things, attempting to look within the Award rather than at its clear instruction; to focus upon their reading of the basis for the Arbitrator's decision rather than upon their failure to properly comply with its mandates; to examine the Arbitrator's findings regarding untruthfulness rather than upon the remedy he ordered. In short, they appear to be retrying the case they tried to make against Deputy La France rather than trying to figure out how his reinstatement could have been implemented.

In this regard, the Respondents' ignored the critical difference between "reinstatement" and a "return to *full duty*" arguing that the order to reinstate the grievant was subservient to the steps necessary to return him to *full* duty. They did not deny nor materially add to any of the Appellant's previously submitted Statement of the Case.

Instead, the Respondents reiterated their unlawful thinking and asserted that even though the Guild had objected to the scheduled examinations as required, the Respondents neither heard those objections nor scheduled a hearing on them as required by Civil Service law.[1] All we

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[1] CP 611, 719-26, 729-30.

read is that the Guild objected, and Deputy La France failed to attend, not that the timely objections barred the examinations.[2]

Seeking to have this matter resolved in their home County, the County and the Sheriff sought a Writ in Kitsap County.[3] The Guild successfully moved the matter to Pierce County where it ultimately became a counterclaim in this case.[4] Although the Court granted the County's summary judgment motion denying enforcement of the Award, it also denied the County's writ.[5]

SUMMARY OF ARGUMENT

As argued before, the Trial court's award of summary judgment for the County was improper and unwarranted. Specifically, the Award should have been enforced in three ways: (1) Deputy La France should have been reinstated as of July 17, 2004 or earlier, particularly since Deputy La France's actual physical and psychological status at any time since his discharge on November 29, 2001 was clearly not resolved; (2) Deputy La France should be paid his full wages and benefits as of the date of his reinstatement, not the date of his restoration to full duty; and (3) the County should have timely removed termination-related matters from

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[2] *See* Respondent/Cross-Appellant's Brief herein at 9.
[3] CP 596-98, 612, 1078-86, 1472.
[4] CP 668-70, 599-605, 1301-02.
[5] CP 1560-63, 1586-87; RP 29-31.

Deputy La France's personnel files and disseminated information concerning his wrongful termination to third parties.

The Cross-Appellants have also sought appeal of the trial court's denial of their request for a Writ of Certiorari. This claim arises from their desire to "trump" the Arbitrator's Award with something that was not argued to the arbitrator, nor warranted as a matter of public policy. They also have argued erroneously that the Arbitrator imposed an improper burden of proof. Neither case law or logic supports their position. The trial court's judgment on this issue should be sustained and the Writ denial upheld.

ARGUMENT

I. The Standards for Summary Judgment Preclude an Award for the County and Support a Summary Judgment of Enforcement

As noted, the standards for summary judgment are well established. Under these circumstances, and as argued before, the reasonable inferences arising from the evidence establish that Deputy La France was not reinstated until after he passed physical and psychological fitness exams,[6] that Deputy La France was not paid either wages or key benefits prior to that time,[7] and that the County failed to purge his files and records, or either advise third parties that the discharge was wrongful

[6] Bonneville Affidavit, CP 711-834 at ¶11.
[7] *Id.*

and that he was reinstated, or correct them regarding the prior disclosures that had been made.[8] These facts are uncontroverted. As argued, all of this makes summary judgment for the County, as awarded by the trial court, impossible. Summary judgment for the County must be denied.

In response,[9] the County has argued that the Arbitrator did not award retroactive wages; that the passing of mental and physical examinations was a condition precedent to a return of the grievant to full duty; and, that they should have been discharged from their contract by the doctrines of impossibility and impractability.

A. Reinstatement with Full Pay was Due Prior to this Suit.

One might begin with retroactivity. Although the County attempts to ignore it, the Arbitrator clearly decided that the termination of Deputy La France was improper, and that it should be reversed.[10] Nothing else was at issue. The language of the Award seems clear. As argued before, the Arbitrator found that Deputy La France "was not fit for duty at the time of his discharge" and that "[s]ince Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay, *per se*...."[11]

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[8] CP 224-245 at ¶16.
[9] Found beginning at Respondent's Brief at 53.
[10] Amended Complaint, CP 8-84, at ¶¶2.7-2.8 as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a). *See also* CP 711-834 at ¶5 (Bonneville Affidavit dated November 17, 2005) (Exhibit 2 thereof is the Arbitrator's Decision and Award, pp. 1-47). Also attached as Attachment 1 to the Bonneville Declaration, CP 609-663, filed November 9, 2005) and in Exhibit C to the Declaration of George E. Merker, CP 897-1028, filed November 28, 2005).
[11] *Id.* at 46.

That does not mean, however, that he should not be reinstated and paid from that point forward. This was at least true on the date of the Award, July 17, 2004.

The Appellants have also argued that Deputy La France should have been reinstated and therefore paid effective August 21, 2003, the date on which he was found to be fit for duty by Dr. John E. Hamm, a licensed medical doctor, and a practicing psychiatrist. This date was, of course, not before the Arbitrator since it is irrelevant to the propriety of the discharge and the employee's "return ... to regular status [was] not an issue in this case."[12] Nevertheless, and as argued before, if the Arbitrator reversed the 2001 termination, and conditioned Deputy La France's return upon his physical and psychological fitness for duty, that condition was met almost a year before the Award, or by August 21, 2003.[13] Once the Award was issued, the Deputy should have been reinstated as of the date of his exams. In any event, a summary judgment for the employer on this issue, as

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[12] *Id.*

[13] Ironically, as argued, in 2004 the County refused to give the first report by Dr. Hamm any credence, and ultimately acted unilaterally to schedule new appointments with Dr. Hamm (again) and another doctor. The County then tried to skew these exams by submitting a host of unfounded accusations about Deputy La France to these Doctors. *See* Bonneville Declaration, CP 609-663 at ¶10 (a copy of the letter to Dr. Hamm was furnished as Exhibit 12 to the Aufderheide Declaration dated September 22, 2005 and filed as Exhibit 7 to the Merker Declaration, CP 897-1028). As a result, the Guild properly objected to the examinations as required by the applicable civil service rules, and the County just ignored these objections. Eventually, in order to be reinstated and paid, Deputy La France voluntarily submitted to these examinations despite his objections. He passed both. Bonneville Affidavit, CP 711-834 at ¶11.

issued by the trial court, was improper and unwarranted. Again, it should be reversed and summary judgment should be granted for the employee and the Guild on this uncontested fact.

Next, the Appellants have argued that the Award stands for the proposition that the discharge was improper and was rescinded. Indeed, the sole question before the arbitrator was whether the discharge of Deputy La France on November 29, 2001 was warranted. As noted, the arbitrator held that it was not, and that the discharge of Deputy La France was improper and should be reversed. This has not been refuted by the Respondents. Again, summary judgment should be granted for the employee and the Guild, not the employer, on this uncontested factual issue. The decision of the trial court should be reversed and remanded.

Last, the employer says that if the employee has a problem with the implementation of the award, let him grieve and arbitrate that dispute, too.[14] Nevertheless, practically, there has to be an end to this long matter. The parties have gotten their day in Court per their agreement (at least three times counting the arbitration, its enforcement action and this appeal). It follows from the order reversing the termination, that it was wrong and that the Respondents' further reliance upon it is misplaced.

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[14] *See* Respondents' Brief herein at 57.

That is all the plaintiff asks; it is an integral part of this dispute. The Appellants' should not have to begin anew.

There are no inferences to be drawn for the County from the facts presented. The summary judgment holdings of the Washington courts unanimously concur that summary judgment for the employer should be denied.

B. Although the Passing of Mental and Physical Examinations was a Condition Precedent to a Return of the Grievant to Full Duty, it was Not Necessary to Reinstate the Grievant or to Pay Him

Secondly, the Respondent's maintain that the passing of mental and physical examinations was a condition precedent to a return of the grievant to full duty, but they were not necessary to reinstate the grievant or to pay him. This has been discussed above, but another take on the argument is necessitated by the Respondent's argument.

The Award notes:

> The Grievant should also be allowed to return to *full duty* upon passing independent psychological and physical fitness-for-duty exams as normally utilized by the Employer. The retroactivity of the return of the Grievant to regular status is not an issue in this case....[15]

The meaning of the section is reasonably apparent. An appointed arbitrator is constricted by the parties. He cannot make generalized fitness evaluations, he cannot assess disabilities unless asked to do so, and he

[15] *Id.* (emphasis added).

cannot condition reinstatement upon fitness evaluations outcomes because to do so would be a denial of due process since the employee could seek disability accommodation, and the Guild would presumably have the power to contest unfavorable fitness findings with its own doctor and even a separate arbitration hearing. Arbitrator Gaba did not award retroactive pay, *per se*...

> As the Appellants argued before:
>
> > It follows that the arbitrator did not act illegally here; instead, he made an enforceable decision to reverse the discharge. He did not condition *reinstatement* upon the fitness exams. That would be unlawful because, among other things it is not called for in the CBA, and it would violate the Americans with Disabilities Act of 1990[16] and the Washington Law Against Discrimination.[17] To the contrary, once he decided the dispute before him, *i.e.*, the termination dispute, this matter was done. As he explained: The employee's "return ... to regular status [was] not an issue in this case."[18]

Although, Deputy La France was not entitled to retroactive pay, *per se,* he was clearly entitled to be reinstated as of the Award since it nullified his discharge. To do otherwise is a denial of the reinstatement the employee was awarded. Indeed, if the County is correct in its analysis, and there was no relief awarded until subsequent medical exams occurred, one is tempted to ask what "reinstatement" as granted in the Award means.

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[16] 42 U.S.C. §12101, *et seq.*
[17] RCW 49.60.010, *et seq. See e.g., Josephs v. Pacific Bell,* 443 F.3d 1050, 17 Am. Disability Cases (BNA) 1465 (2006).
[18] *Id.*

When the Award grants reinstatement, it must necessarily envision reinstatement to employment. The examinations were merely a condition of "*full duty*." The evidence supporting the Award is contained in the Award itself—the termination was reversed and, even though there was some punishment given, the grievant was awarded reinstatement and full duty upon completion of mental and physical examinations. There is absolutely no evidence that this occurred. Instead, the County argues without authority in either the law or the parties' negotiated contract, that the Court should recognize that "[t]he state of being employed, or reinstated, does not, in and of itself, entitle an employee to wages."[19] To the contrary, the contract and law clearly provides that the state of being employed entitles one to wages unless they have agreed otherwise.[20] In any event, a summary judgment for the employer on this issue, as issued by the trial court, was improper and unwarranted. Again, it should be reversed and summary judgment should be granted for the employee

al issue.

C. No Discharge of the Collective Bargaining Agreement Arises under the Doctrine of Impossibility or Impracticability.

Last, the County argues, for the first time in its response on appeal, that it should have been discharged from the negotiated collective

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[19] Respondent's Brief herein at 56.
[20] *See* Ch. 49.46 RCW; Ch. 49.48 RCW; Ch. 49.52 RCW.

bargaining contract by the doctrines of impossibility and impracticability.[21] The essence of this argument is that no reinstatement could have occurred because Deputy La France refused to submit to fitness for duty exams. This, of course, posits that the exams were a proper condition precedent to reinstatement, a proposition which is illogical, inconsistent with administrative leave as a concept, and wholly unproven. In short, like the retroactive benefit calculations made by the County, the analysis only applies if you first agree with the premise that the County is correct. If they are not correct, the entire house of cards collapses.

The doctrine of impossibility excuses a party from performing a contract where performance is impossible or impracticable due to extreme and unreasonable difficulty, expense, injury or loss.[22] The event which renders performance impossible must be fortuitous and unavoidable on the part of the promisor.[23] When the existence of a specific thing is necessary for the performance of a contract, the fortuitous destruction of that thing excuses the promisor unless he has clearly assumed the risk of its

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[21] Respondents Brief herein at 54.
[22] *Thornton v. Interstate Sec. Co.*, 35 Wn. App. 19, 30, 666 P.2d 370 (1983); Restatement of Contracts § 454 (1932).
[23] *Thornton*, at 31.

continued existence.[24] At best, the refusal of Deputy La France to attend the objectionable exam unilaterally scheduled by the County may have been outside their control, but there has certainly been no evidence that the County could not have functioned in the face of this situation. Thus, the doctrine just does not apply.[25] Moreover, the doctrine of impossibility and impracticability discharges a party from contractual obligations when a basic assumption of the contract is destroyed and such destruction makes performance impossible or impractical, provided the party seeking relief does not bear the risk of the unexpected occurrence.[26] Performance of a contract is excused under this impossibility doctrine only on a showing of "extreme and unreasonable difficulty, expense or injury."[27] Performance is not excused merely because it became "more difficult or expensive than originally anticipated" to keep contractual obligations.[28] Again, the doctrine just does not apply, especially given the many tools available to control recalcitrant employees.

Throughout the Response, and on each issue argued by the Respondents, the standards for summary judgment preclude an award for

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[24] 18 S. Williston, Contracts § 1948 (3d ed. 1978); Restatement of Contracts § 460 (1932) cited with approval in *Metro. Park Dist. v. Griffith,* 106 Wn.2d 425, 439-440 , 723 P.2d 1093 (1986).
[25] *Metro. Park Dist. v. Griffith, supra.*
[26] *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.,* 104 Wn.2d 353, 363-64, 705 P.2d 1195, 713 P.2d 1109 (1985).
[27] *Pub. Util. Dist.,* 104 Wn.2d at 364.
[28] *Id.* cited with approval in *Tacoma Northpark, LLC v. NW, LLC,* 123 Wn. App. 73, 81, 96 P.3d 454 (2004).

the County and support a summary judgment of enforcement for the Guild. The decision of the trial court should be reversed.

II. No Writ of Certiorari Should Be Issued.

The Respondents seek a Writ of Certiorari wholly overthrowing the Award upon two grounds. First, and notwithstanding the fact that the evidence clearly shows that the Arbitrator weighed the facts and concluded that the termination was to be reversed, the Cross-appellants' claim that the Arbitrator exceeded his jurisdiction after a finding that he was "untruthful."[29] This is tantamount to saying that whenever a law enforcement officer has been untruthful in any respect, he or she must be fired. Second, the Arbitrator wrongfully shifted the burden of proof to the respondents. These two theories need to be examined.

A. The *Brady* Decision Does Not Require Disclosure in this Case

The prosecution must disclose evidence that is material to either the guilt or the punishment of the accused.[30] The disclosure rule has broad application, and will be applied even though the alleged nondisclosure is negligent or passive rather than willful.[31] On the other hand, the

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[29] Respondents' Brief herein at 17.
[30] *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Paradis v. Arave*, 130 F.3d 385 (9th Cir. 1997).
[31] *U.S. v. Keough,* 391 F.2d 138, 34 ALR3d 1 (2d Cir. 1968); *Levin v. Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966).

government is not required to disclose "every scintilla" of evidence that might conceivably inure to the defendant's benefit.[32]

Evidence is material for purposes of the rule requiring disclosure only if there exists a reasonable probability that the result at trial would have been different had the evidence been disclosed.[33] Evidence which would impeach a government witness must be disclosed,[34] but the mere possibility that the evidence at issue could be used to impeach a witness is not enough to demand disclosure.[35]

In determining whether the materiality requirement of *Brady* has been reached, one must look at the evidence not item-by-item, but collectively.[36] Ultimately, this burden to assess the evidence falls upon the prosecution. They alone, who know what has not been disclosed, are assigned to determine the likely net effect of all such evidence and to make disclosure when the point of "reasonable probability" has been reached.[37] If the omitted evidence is sufficient to create a reasonable doubt as to the guilt of the accused *that did not otherwise exist*,

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[32] *Lieberman v. Washington,* 128 F.3d 1085 (7th Cir. 1997).
[33] *Wood v. Bartholomew,* 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995); *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 22 Fed. R. Evid. Serv. 1 (1987); *U.S. v. Bagley,* 473 U.S. 667; 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Carriger v. Stewart,* 132 F.3d 463 (9th Cir. 1997), cert. denied, 118 S.Ct. 1827, 140 L.Ed.2d 963 (1998).
[34] *See U.S. v. Wong,* 78 F.3d 73 (2d Cir. 1996).
[35] *See U.S. v. Dierling,* 131 F.3d 722, 48 Fed. R. Serv. 466 (8th Cir. 1997), cert. denied, 118 S.Ct. 1379, 140 L.Ed.2d 659 (1998), and, cert. denied, 118 S.Ct. 1401, 140 L.Ed.2d 659 (1998), and, cert. denied, 118 S.Ct. 2310, 141 L.Ed.2d 168 (1998).
[36] *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).
[37] *Id.*

constitutional error has been committed.[38] Moreover, there is no duty to disclose where the defense can acquire the information with reasonable diligence;[39] the arbitration decision here has been made public and is in the public records maintained by the trial court.

The attitudes and fears expressed by the County are a hysterical reaction, and one which is both illogical and unlikely. The essence of the argument is that the Deputy was found to have been untruthful with regard to matters which were fully investigated and tried to the Arbitrator. As noted by the County, he "lied three times to a Sergeant about the existence of work-related materials in the trunk of his patrol car and on floppy disks in his possession, and also lied about the status of several case files.[40]

Of course, even taken as alleged, the statements themselves were not made under oath or in the context of any official report. At most, Deputy La France mislead his supervisor. The arbitrator considered the evidence, and decided that "the Employer has failed to show by clear and convincing evidence that the penalty was appropriate...."[41] This was just not a dischargeable offense.

Moreover, the statements are not material. At most, they show untruthfulness on extraneous matters; again, the "mere possibility that the

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[38] *U.S. v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).
[39] *State v. Brooks,* 960 S.W.2d 479 (Mo. 1997), cert denied, 118 S.Ct. 2379, 141 L.Ed.2d 746 (1998).
[40] Declaration of Russell D. Hauge dated July 18, 2005 at ¶5.
[41] Award at 45.

evidence at issue could be used to impeach a witness is not enough to demand disclosure." The evidence is almost certain to be insufficient to create a reasonable doubt as to the guilt of the accused *that did not otherwise exist*. Lastly, the defense clearly has access to the records here. They just are not disclosable.

However, even if disclosable under *Brady,* and CrR 4.7(a)(3) and CrRLJ 4.7(a)(3) which codify it, and even if a defendant may be entitled to the *disclosure* of exculpatory evidence, the evidence is not automatically *admissible* or subject to extensive use at trial. Moreover, the disclosures required must "tend[] to negate defendant's guilt as to the offense charged."[42] This analysis can be considered in more detail.

Brady arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. In the first situation, typified by *Mooney v. Holohan,*[43] the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. This does not involve the situation here; this is not a case in which the prosecution is based upon perjury, nor is there any evidence that Deputy La France has lied about defendants in criminal prosecutions.

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[42] CrR 4.7(a)(3); CrRLJ 4.7(a)(3)
[43] 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340 (1935).

The second situation, illustrated by the *Brady* case itself, is characterized by a pretrial request for specific evidence.[44] "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[45] Although in *Mooney* the Court had been primarily concerned with the willful misbehavior of the prosecutor, in *Brady* the Court focused on the harm to the defendant resulting from nondisclosure.[46] There is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. This might make the La France issue be reviewed by the trial judge, but it

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[44] In that case defense counsel had requested the extrajudicial statements made by Brady's accomplice, one Boblit. The US Supreme Court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was "material."

[45] 373 U.S., at 87.

[46] *See* discussions of this development in Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 YALE L.J. 136 (1964); and Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. CHI. L. REV. 112 (1972).

does not require voluntary, un-requested disclosure, nor does it assure that the evidence will even be admitted at trial.

The third situation in which the *Brady* rule arguably applies, typified by *United States v. Agurs,*[47] embraces the case in which only a general request for "*Brady* material" has been made. That is to say, when does the prosecution have the duty to volunteer information to the defense to avoid a *Brady* violation? This is the issue here. Yet, the disclosure will be very limited here.

As noted above, the defendant must prove three elements in order to show a *Brady* violation. First, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material.[48] Second, the evidence must have been suppressed by the State, either willfully or inadvertently.[49] Third, prejudice must result from the failure to disclose the evidence.[50] Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial.[51] For

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[47] *Supra,* 427 U.S. 97, 110, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).
[48] *See Bagley,supra* 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).
[49] *Agurs,* 427 U.S. at 110 cited with approval in *Benn v. Lambert,* 283 F.3d 1040, 1052-1053 (9th Cir. 2002).
[50] *See Bagley, supra* 473 U.S. at 678.
[51] *See Bagley, supra* 473 U.S. at 676; *Agurs, supra* 427 U.S. at 111-12. As the *Benn* court noted at fn 9: "The [U.S.] Supreme Court refers to the requirement that the defense establish that the suppressed evidence was prejudicial to the outcome as a "materiality" requirement and/or a "prejudice" requirement. *See Brady,* 373 U.S. at 87 (requiring that the suppressed evidence be "material" to guilt or punishment); 373 U.S. at 88 (referring to the state's suppression of a confession as "prejudicial" to the defendant). The terms "material" and "prejudicial" are used interchangeably in *Brady* cases. Evidence is not "material" unless it is "prejudicial," and not "prejudicial" unless it is "material." Thus,

purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record."[52] Whether the matters in question here are prejudicial, *i.e.* material, are questionable. If they are immaterial, no disclosure need be made. Nevertheless, in *Benn,* the court applied an expansive view of "prejudice."[53]

Thus, at most, *Brady* requires *disclosure* of the fact that Deputy La France was found to have been untruthful in four matters in 2000-2001, despite a good deal of exculpatory evidence regarding his long-standing overall conduct, generally favorable performance evaluations, undisputed evidence regarding an illness, his grievance and reversal of the termination which was imposed at that time, and the finding of a dispute with his immediate supervisor in which the latter's behavior was criticized by the arbitrator.

That just concerns *disclosure.* We then come to whether the evidence is *admissible, i.e.,* whether it ever gets to a trier of fact. The *admissibility* of evidence is controlled by the Rules of Evidence. ER 404 reads:

> **Rule 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

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for *Brady* purposes, the two terms have come to have the same meaning." *Benn,* 283 F.3d at 1053.

[52] *Agurs,* 427 U.S. at 112 cited with approval in *Benn, supra* at 1052-1053.

[53] *Benn, supra.*

> **(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> **(1) Character of Accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> **(2) Character of Victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> **(3) Character of Witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.
>
> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As a result, evidence of a witnesses' character or character traits is generally *not* admissible to show that the witness acted in conformity with them on another occasion, like in their testimony, unless permitted by ER 404(a).[54] ER 404(a)(3), entitled "Character of Witness," the only relevant section, refers readers to Rules 607, 608 and 609.[55]

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[54] Evidence of other crimes, wrongs, or acts is *not* admissible to prove character as a basis for suggesting that conduct on a particular occasion was in conformity with it. ER 404(b). The evidence may, however, be offered for another purpose such as proof of motive or opportunity. The court must determine whether the danger of undue prejudice

Rule 607 provides only that the credibility of a witness may be attacked by any party and is irrelevant to our concerns here. Similarly, ER 609 is concerned with the rules regarding impeachment by evidence of the conviction of a crime and is therefore beyond these comments. ER 608, however, is on point and reads:

> **Rule 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**
>
> **(a) Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.
>
> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to

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outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors. Slough & Knightly, Other Vices, Other Crimes, 41 IOWA L. REV. 325 (1956). Previous Washington law is in accord. *See State v. Whalon,* 1 Wn.App. 785, 464 P.2d 730 (1970). Aronson, THE LAW OF EVIDENCE IN WASHINGTON at § 404.02, § 404.02 Task Force Comment 404 (2004) (herein "Aronson").

[55] ER 404(a)(3). "Rule 404 is concerned only with the admissibility of character as substantive evidence.... The issue should not be confused with the admissibility of character for purposes of impeachment, governed by Rules 608 and 609." Tegland, Courtroom Handbook on Washington Evidence, WASHINGTON PRACTICE 2004 (herein "Tegland") at 212.

which character the witness being cross-examined has testified.

ER 608 governs the impeachment of a witness by evidence of a poor reputation or by specific instances in a witness' past. Rule 608(a) expresses the traditional view that the credibility of a witness may be attacked by evidence of their reputation as an untruthful person. Nevertheless, a specific foundation must be established to prove reputation evidence, and any significant deviation from the standard script is error.[56] Moreover, reputation among a limited group of persons may not accurately reflect a witnesses' general character for truthfulness and may be excluded.[57]

Nevertheless, this is rare and it is certainly not what we have here. By contrast, Deputy La France has a *reputation* for honesty used by the County in many prosecutions, both in his career and in the community. Even the arbitrator found that the behavior in question was "bizarre" as far back as the Spring of 2000 and aberrant enough to have been recognized by "almost any other supervisor" prior to January 2001. Then he was found fit for duty three times and returned to active duty. Under these circumstances, it is virtually impossible to prove that Deputy La France has a *reputation* for dishonesty.

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[56] Tegland at 292. *State v. Maule,* 35 Wn.App. 237, 667 P.2d 96 (1983).
[57] *Id; State v. Lord,* 117 Wn.2d 829, 822 P.2d 177 (1991), adhered to, 123 Wn.2d 296, 868 P.2d 835 (1994), opinion clarified, 123 Wn.2d 737, 870 P.2d 964 (1994).

ER 608(b) is equally inapplicable. As Aronson notes:

> This section ... gives the court discretion to allow inquiry on cross examination into specific instances of conduct bearing upon the credibility of the witness. The effect of rule 608(b) upon existing Washington law is not entirely clear. Although there is not total consistency in the Washington case law, the general rule appears to be that acts of misconduct not the subject of a prior conviction have not been admissible for impeachment purposes. "[A] witness may not be impeached by showing specific acts of misconduct. This is true whether the impeachment is attempted by means of extrinsic evidence or cross-examination." *State v. Emmanuel,* 42 Wn.2d 1, 253 P.2d 761 (1950). There are some cases written in terms of a discretionary power in the judge to admit evidence of acts of misconduct, but these appear to be early cases and probably do not represent the current rule. Meisenholder § 301. ... The drafters of the Washington rules felt that the rule, restricted as it is to matters probative of truthfulness or untruthfulness, clarified the law and reflected a sound policy.[58]

Yet, the Rule allows inquiry into specific instances only when those instances demonstrate a *general* disposition for truthfulness or untruthfulness.[59] If the witness denies the specific instance on cross-examination, the inquiry is at an end.[60] The cross-examiner must "take the answer" of the witness and may not call a second witness to contradict the first answer.[61] This rule is designed to prevent time-consuming litigation

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[58] Aronson, THE LAW OF EVIDENCE IN WASHINGTON § 608.02
[59] Tegland at 294.
[60] *Id.*
[61] *State v. Barnes,* 54 Wn.App. 536, 774 P.2d 547 (1989).

over issues that are only collateral to the merits of the case.[62] Having challenged the witness, the witness may explain the circumstances.[63]

Thus, it would be difficult if not virtually impossible to go anywhere with a direct attack on Deputy La France's credibility. The generality that he had been untruthful would simply be denied. The specific instance that he has once received a reprimand for untruthfulness might get in but could be readily explained. Either way, the inquiry would be over. The risk of impeachment is very small. As argued, the prosecutor and sheriff's concerns are hysterical.

B. No Shift in the Burden of Proof Occurred

The second reason for a writ submitted by the Cross-Appellants arises from their argument that the Arbitrator shifted the burden of proof and required the employer to show that Deputy La France was not disabled. This simply did not occur, nor if it had would it be relevant to the matters at issue.

Again, the sole issue concerned whether the termination was proper, both as a substantive matter of discipline and as a remedy. The employer admits that it bore the burden of proving that Deputy La France was properly disciplined and discharged. Toward that end, the Deputy called Antone Pryor, Ph.D. to testify concerning Deputy La France's

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[62] *United States v. Adams,* 799 F.2d 665 (11th Cir. 1986).
[63] *State v. Mak,* 105 Wn.2d 692, 718 P.2d 407 (1986).

mental health condition and how they may have caused his alleged misconduct.[64] The Arbitrator found that a reasonable employer would have known of the disabling condition—and that the employer therefore failed to prove that the employee was liable for all of his actions, e.g., that under these circumstances he should not have been fired. Indeed, the Award is quite clear—and had the burden of proof been different, the employer would have prevailed. Yet there was no "shift" of the usual burden.

The County and the Guild have collectively bargained and agreed that discipline is controlled by the CBA and must be for "just cause." Just cause is "what reasonable men, mindful of the customs and habits of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances...."[65] In 1966, Arbitrator Daugherty reduced the different approaches taken by arbitrators in determining whether "just cause" exists into a list of seven tests in the form of questions.[66] One of those questions is "was the degree of discipline administered by the County in this particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of Deputy La France in his service with the County?[67] If even one of these

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[64] CP 1249-1252.
[65] *Riley Stoker Corp.*, 7 LA 764, 767 (Platt, 1947).
[66] *Enterprise Wire Co.*, 46 LA 359, 363-4 (Daugherty, 1966).
[67] *Id.*

questions is answered in the negative, then the just cause requirement has not been satisfied, and the discipline imposed must be reversed because it violates the contract. In assessing these questions, an Arbitrator is required to define the nature of the burden of proof and place that burden upon the parties.

Proof in "just cause" cases like this is routinely placed upon the employer.[68] In this case, the employer has apparently accepted that burden.[69] This is appropriate because the employer has asserted that it has just cause for the imposition of discipline, an affirmative factual matter.[70] As Arbitrator Koven noted:

> In all discharge cases...because of the seriousness of the penalty, because seniority and other contractual benefits may be lost and because the employee's reputation may be at stake, the burden is always on the employer to prove guilt of wrongdoing.[71]

The County must prove, in light of the provisions of the CBA, and the seriousness of the penalty, that it had just cause for disciplining Deputy La France.

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[68] *See* Elkouri and Elkouri, HOW ARBITRATION WORKS (Ruben, ed., 6th Ed., 2003) at Ch. 15(3)(D)(i).

[69] *See* Tr. 430:8-11; the employer also presented its case first.

[70] *See, e.g., AFG Indus.*, 87 LA 568 (Clarke, 1986); *Washington Metro. Area Transit Auth.*, 82 LA 650, 651 (Tharp, 1984) ("It is an elementary rule of labor arbitration that in cases of discipline, the burden of proof rests upon the employer."); *Lockheed Aircraft Corp.*, 27 LA 709 (Maggs, 1956); *St. Joseph Lead Co.*, 16 LA 138 (Hilpert, 1951); *Armin Berry Casing Co.*, 17 LA 179 (Smith, 1950).

[71] *Atlas Freight Lines*, 39 LA 352, 358 (Koven, 1962). *See also, Eastern Air Lines*, 89 LA 492, 493 (Jedel, 1987); *Kable Printing Co.*, 89 LA 314, 318 (Mikrut, 1987); *Rohr Industries, Inc.*, 78 LA 978, 982 (Sabo, 1982); *Southeastern Pa. Transportation Auth.*, 90 LA 492; *Kable Printing Co.*, 89 LA 314; *Misco, Inc.*, 89 LA 137.

Quite apart from the *placement* of the burden on the County is the determination of the *degree* of evidence necessary to satisfy the County's burden of proof. While the *burden* of proof addresses which party has the obligation of proving the ultimate issue in a case, the *quantum* of proof concerns the standard that the arbitrator applies to determine whether that burden has been sustained.[72] The standard of proof allocates the risk of error between the litigants; it is indicative of the relative importance attached to the ultimate decision.[73]

A finding that Deputy La France should have been terminated is certainly serious. There is no doubt that a termination of Deputy La France would become part of his permanent employment record both with the County and, if sustained, with the state itself, permanently tarnishing his reputation and even eliminating his ability to work in law enforcement. For instance, if the discharge of Deputy La France had been sustained, he would not only lose his job with the County and his LEOFF (state law enforcement) retirement, but under state law he would undoubtedly lose his entire career in law enforcement.[74] This is an exceedingly harsh

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[72] Fairweather's PRACTICE AND PROCEDURE IN LABOR ARBITRATION (Schoonhoven, 3rd Ed., 1991) at 196.

[73] *Nguyen v. Dep't of Health Medical Quality Assurance Comm'n,* 144 Wn.2d 516, 524, 29 P.3d 689, 692 (2001).

[74] RCW 43.101.095 provides that all law enforcement officers must be "certified" "as a condition of continuing employment." RCW 43.101.135 provides that a certification shall be reported to the Criminal Justice Training Commission, and RCW 43.101.125 provides for automatic decertification where a law enforcement officer has been involuntarily terminated. RCW 43.101.224 specifically speaks to training for officers

penalty. The only exceptions are breaks due to a successful appeal of a disciplinary discharge or a work-related injury.[75]

Indeed, the more important the interest, the less tolerant we are as a civilized society that it be erroneously deprived; [76] the more important the decision, the higher the standard under the burden of proof. [77] In a case such as this, where the employee has been charged with serious offenses, and the charges which are sustained will leave the employee identified as a decertified police officer for life to suffer the associated stigma of general social disapproval, the employer must prove those accusations with a very high burden of proof. An error is both critical and irreversible. As a result, this is a very important case; if the result had been adverse to Deputy La France, it would have resulted in a life-long stigma making him virtually unemployable in his profession.

For that reason, in a similar discharge case, Arbitrator Nicholas held that "the traditional 'preponderance of the evidence' standard is too low a threshold for proving up just/proper cause."[78]

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conducting child porn investigations. Nothing was done under that statute in Kitsap County.

[75] RCW 43.101.125; Tr. 526:12-527:19.

[76] *Id.*

[77] *Nugyen, supra* at 524.

[78] *See* cases cited at Ch. 15(3)(D)(1), fn 125, Elkouri & Elkouri, *supra. See also MacMillan Bloedel Containers*, 92 LA 592, 600 (Nicholas, 1989). *See, e.g. Walt Disney World Company*, 2001 WL 845863 (Sergent, 2001); *Michigan Family Resources*, 2001 WL 812817 (Daniel, 2001); *Tower Automotive Products Co.*, 115 LA 1077 (Wolff, 2001); *The University of California, Los Angeles,* 113 LA 4, 6-7 (Richman, 1999); *Contempo Coulors, Inc.*, 112 LA 356, 359 (Daniel, 1999); *American Safety Razor*

Instead, a "clear, cogent and convincing standard" ensures that the employer has properly presented enough evidence to convince the arbitrator that the discipline is justified, which is an especially necessary safeguard when the discipline imposed is serious and permanent. For instance, in *Kroger*, Arbitrator Smith held:

> It seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval... should be clearly and convincingly established by the evidence. *Reasonable doubts raised by the proofs should be resolved in favor of the accused.*[79]

This idea has gotten strong support in Washington State where the preponderance standard has been almost eliminated in other cases of alleged serious professional misconduct. In *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*,[80] the Washington Supreme Court held that a physician licensing board violated the petitioner's due process rights by applying only a "mere preponderance" standard. The Court held that the hearing involved a "personal interest of great importance" which should not be taken on a mere preponderance standard. The *Nguyen* Court explained:

Company, 110 LA 737, 744 (Hockenberry, 1998); *Kroger Co.*, 25 LA 906 (Smith, 1955); *see also, City of Tallahassee v. Big Bend Police Association*, 710 So.2d 214, 215 (Fla.App. 1998) (upholding the arbitrator's opinion applying clear and convincing burden of proof); *City of Kankakee*, 97 LA 564 (Wolff, 1991) (reviewing the decisions of various arbitrators); *cf. Fairbanks Fire Fighters Association*, 2001 WL 685370 (Landau, 2001) (applying a clear and convincing standard in suspension of a firefighter).

[79] *Kroger Co.*, 25 LA 906, 908 (Smith, 1955) (emphasis added).

[80] *Supra*, 144 Wn.2d 516.

> The intermediate clear preponderance standard is required in a variety of civil situations "to protect particularly important individual interests," that is those interests more important than the interest against erroneous imposition of a mere money judgment. (Citation omitted). Examples of such proceedings include mental illness commitment, fraud, "some quasi criminal wrongdoing by the defendant" as well as the risk of having ones' "reputation tarnished erroneously." (Citation omitted.) Medical disciplinary proceedings fit triply within this intermediate category because they (1) involve much more than a mere money judgment, (2) are quasi-criminal, and (3) also potentially tarnish one's reputation.[81]

Arbitration grievance proceedings for police officers closely parallel the interests at stake in *Nguyen*. What is at stake is more than just money. Accusations of misconduct are involved, and significant issues of reputation are at stake. The adverse impact of a sustained offense upon the career of a law enforcement officer is entitled to no less protection than the potentially adverse impact upon the license of a physician for similar alleged wrongdoing. Deputy La France was terminated under circumstances where a vast majority of arbitrators would impose at least a clear, cogent and convincing standard of proof.

The "just cause" standard involves not only whether an officer engaged in conduct that warrants some discipline, but whether the level of discipline imposed was appropriate and fair given the officer's actions. An arbitrator under this collectively negotiated agreement must not simply

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[81] 144 Wn.2d at 525, 29 P.3d at 693.

impose the disciplinary choice made by the employer even if the wrongdoing itself is sustained. "Inherent in the right to discipline for just cause is the requirement that the form and degree of discipline be reasonable both as regards the basis for discipline and the penalties assessed."[82] This is what happened here.

Court decisions recognize broad arbitral discretion to review the reasonableness of the penalty assessed.[83] The Arbitrator must determine whether the penalty assessed was just and proper under all the circumstances, and was consistent with disciplinary action taken in other cases.[84] To do otherwise, or to defer to the remedy imposed, disregards the parties' negotiated agreement to apply just cause to the entire disciplinary decision. Indeed, an arbitrator is to bring his or her informed judgment to bear in order to reach a fair solution, especially when it comes to formulating remedies.[85]

This is also largely a question of fairness. Whether a given level of discipline is appropriate in a particular case depends on the totality of the circumstances.[86] In this regard, it has been recognized that:

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[82] *Merchant's Fast Motor Lines,* 103 LA 396, 399 (Shieber, 1994) citing *Clow Water Sys. Co., supra.*
[83] Elkouri & Elkouri, *supra* at Ch. 15(3)(E)(i).
[84] *Riley Stoker Corp., supra* at 767 (Platt, 1947); *Capital Airlines, Inc.*, 25 LA 13 (Stowe, 1955); *Huntington Chair Corp.*, 24 LA 490 (McCooly, 1955).
[85] *Paperworks v. Misco, Inc.,* 484 US 29, 126 LRRM 3113 (1987).
[86] *See, Black Clawson Company,* 68 LA 858 (Eischen, 1977).

> [T]he appropriateness of the penalty imposed is evaluated in light of several factors: (1) the proven misconduct; (2) the Grievant's employment record; and (3) whether progressive discipline may serve to correct the Grievant's behavior.[87]

Ultimately, no shift in the burden of proof occurred. The employer just failed to establish that the transgressions ascribed to Deputy La France met the standard for a termination to occur.

C. Constitutional Certiorari is Not Available Here.

A constitutional writ of certiorari is based on Wash. Const. art. IV, § 6 (amendment 87). It provides:

> Said courts and their judges shall have the power to issue writs of mandamus, *quo warranto,* review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties.

Under this provision, a superior court has authority to grant writs of certiorari to review decisions that are not afforded other means of appeal. As a matter of case law, however, review of an arbitration decision under a constitutional writ of certiorari is limited to whether the arbitrator acted illegally by exceeding his or her authority under the contract or was "arbitrary and capricious."[88] As such, a constitutional writ of certiorari is

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[87] *Wholesale Produce Supply Co.*, 101 LA 1101, 1105 (Bognanno, 1993).
[88] *See Clark County PUD No. ,1 supra; Saldin Sec., Inc. v. Snohomish County,* 134 Wn.2d 288, 949 P.2d 370 (1998).

available in somewhat narrower circumstances than the statutory writ of review.[89]

Since "[t]he fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority," a court will grant constitutional review only if the petitioning party "can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious."[90] Thus, no constitutional writ of certiorari will lie unless the arbitrator's award was either illegal or "arbitrary and capricious." Illegality in this context refers to the arbitrator's jurisdiction and authority.[91] "Thus, an alleged error of law is insufficient to invoke the court's constitutional power of review."[92] By contrast, "arbitrary and capricious action is 'willful and unreasoning action, without consideration and in disregard of facts and circumstances[;] [w]here where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous

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[89] *See Bridle Trails Community Club v. City of Bellevue,* 45 Wn.App. 248, 253, 724 P.2d 1110 (1986); *see also Saldin Sec., Inc., supra* at 294-95 (a court may grant a constitutional writ only if no other avenue of appeal, such as a statutory writ, is available).

[90] *Id. (citing Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County,* 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983)).

[91] *See Washington Pub. Employees Ass'n v. Washington Personnel Res. Bd.,* 91 Wn.App. 640, 657, 959 P.2d 143 (1998).

[92] *Washington Pub. Employees Ass'n, supra* at 658 (citing *King County v. Washington State Bd. of Tax Appeals,* 28 Wn.App. 230, 242-43, 622 P.2d 898 (1981); *Pierce County Sheriff, supra* at 694).

conclusion has been reached.'"[93] Although Washington courts have issued constitutional writs of certiorari in labor cases, it is still not available here.[94]

Moreover, in *Clark County PUD No. 1 v. Wilkinson, supra,* another public employment arbitration, the state Supreme Court distinguished cases in which the constitutional writ was allowed, by noting:

> [T]his differs from our standard of review of administrative decisions under constitutional writs of certiorari. We have reviewed administrative decisions not only for whether the decision was outside the decision maker's authority, but also for whether is it was arbitrary and capricious. *See, e.g., Saldin Sec.*, 134 Wn.2d at 292 (review of a county council decision reviewed for whether the council's actions were arbitrary or capricious or illegal). A review of an arbitration decision for whether it was arbitrary and capricious would require an examination of the merits. Because we do not review the merits of arbitration decisions, we decline to apply this standard here.[95]

In other words, in labor arbitrations like this, no case can be reversed because the arbitrator was "arbitrary and capricious" because that would

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[93] *Department of Agric. v. Personnel Bd.*, 65 Wn.App. 508, 513-14, 828 P.2d 1145 (1992) (quoting *Pierce County Sheriff, supra* at 695).

[94] For example, in *Clark County PUD No. 1 v. Wilkinson,* a labor dispute between employees and the Clark County Public Utility District was submitted to arbitration pursuant to the terms of the collective bargaining agreement. The state Supreme Court held that a "constitutional writ of certiorari" was appropriate because there was "no statutory mechanism for judicial review of public employment labor arbitrations." *Clark County PUD No. 1 v. Wilkinson,* 139 Wn.2d 840, 846, 991 P.2d 1161, 163 LRRM 2654 (2000).

[95] *Clark County PUD No. 1, supra* at 246-47.

require an improper inquiry into the merits of the award.[96] This leaves the jurisdictional question as the only basis for reversal in this case.

In that regard, the case of *Klickitat County v. , ,*[97] a similar case, is instructive. In *Klickitat County,* the employer argued that the arbitrator's award should be vacated for illegality and because it was "arbitrary and capricious." Following precedent, the court gave "exceptional deference to an arbitrator's decision, particularly in the realm of labor relations."[98] Then it noted that "Washington case law clearly provides that a court reviewing an arbitration award under a constitutional writ of certiorari determines whether the arbitrator acted illegally or in an arbitrary and capricious manner.[99]

The court concluded that "[t]he two approaches may be harmonized."[100] Again, the Court properly noted that in the constitutional certiorari context, the reviewing court applies the illegal or arbitrary and capricious standard.[101] But to guide the court, the court noted that the

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[96] *Id.*

[97] 104 Wn.App. 453, 464, 16 P.3d 692 (2001).

[98] *Klickitat County, supra* (quoting *Department of Agric., supra* at 515).

[99] *Klickitat County, supra* (citing *Clark County PUD No.1 v. Wilkinson, supra* at 846; *Saldin Sec., supra* at 294; *Department of Agric., supra* at 515).

[100] *Klickitat County, supra* at 461.

[101] *Klickitat County, supra* (citing *Clark County PUD No. 1 v. Wilkinson, supra* at 846; *Saldin Sec.,* 134 Wn.2d at 294.)

arbitrator's award would be given deference.[102] Thus, the *Kittitas County* court concluded that determining if the arbitrator acted within the scope of his authority aids in determining whether the arbitrator acted illegally or arbitrarily and capriciously.[103] "To determine if the arbitrator acted within the scope of his authority, the reviewing court considers the arbitrator's decision in light of the relevant CBA.[104]

As in that case, the collective bargaining agreement ("CBA") here sets out a three-step grievance procedure. Step 1 involves an informal procedure undertaken with the employee's immediate supervisor within fifteen days of the triggering event. If the first step does not resolve the matter, the employee may initiate the second step by filing a written grievance with the sheriff for a final decision. Step 3 entails arbitration on the issue(s) raised at Step 2. Regarding the arbitrable issue(s), the CBA states "[t]he the arbitrator shall be authorized to rule and issue a decision in writing on the issue presented for arbitration, such decision shall be final and binding upon both parties."[105] That section continues "[t]he arbitrator shall rule only on the basis of information presented in the hearing before him/her and shall refuse to receive any information after

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[102] *Klickitat County, supra* (citing *Department of Agric.*, 65 Wn.App. at 515 (acknowledging deference to arbitration awards while reviewing award under arbitrary and capricious standard)).
[103] *Klickitat County, supra.*
[104] *Klickitat County, supra* at 461, (citing *Department of Agric.*, 65 Wn.App. at 515-16).
[105] Amended Complaint at Exhibit A (CBA at Article I, Section F, Step (3)(c)) as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a).

the hearing ...."[106] The same section then adds: "[t]he arbitrator shall have no power to render a decision that will add to, subtract from, or alter, change or modify the terms of this Agreement ...."[107]

Like the *Kittitas County* situation, the La France termination proceeded through these steps to arbitration and eventually, the parties agreed the arbitrator would resolve the following grievance issues: "Did Kitsap County discipline Brian LaFrance without just cause, and if so, what is the appropriate remedy?"[108] The County participated in the arbitration hearing, it called witness, cross-examined the Grievant's witnesses and argued its case. It lost in final and binding arbitration. No objection to any step in the arbitration process was made. Thus, Kitsap County, like Klickitat County before it, incorrectly contends that the arbitrator had no legal authority to consider the matter.

As noted by the *Klickitat County* court,

> [t]he arbitrability of public sector labor-management disputes in Washington is generally governed by rules articulated by the United States Supreme Court in the "'Steelworkers' Trilogy.' *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula,* 130 Wn.2d 401, 413, 924 P.2d 13 (1996) (citing *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d

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[106] *Id.*

[107] *Id.*

[108] Amended Complaint, CP 8-84, at ¶¶2.7-2.8 as verified by the Verification of Brian La France, CP 1070-1072, at ¶2(a). See also CP 711-834 at ¶5 (Bonneville Affidavit dated November 17, 2005) (Exhibit 2 thereof is the Arbitrator's Decision and Award, pp. 1-47 at 2). Also attached as Attachment 1 to the Bonneville Declaration, CP 609-663, filed November 9, 2005) at 2, and in Exhibit C to the Declaration of George E. Merker, CP 897-1028, filed November 28, 2005) at 2.

> 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)).[109]

As the *Klickitat County* court continued:

> In Washington the rules are framed as:
>
> (1) Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which on its face is governed by the contract. (2) An order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage. (3) There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication. *Peninsula Sch. Dist. No. 401,* 130 Wn.2d at 413-14 (quoting *Council of County & City Employees v. Spokane County,* 32 Wn.App. 422, 424-25, 647 P.2d 1058 (1982)). Thus apart from matters that the parties specifically exclude, the questions on which they disagree must come within the scope of the grievance and arbitration provisions of the collective bargaining agreement. *Peninsula Sch. Dist. No. 401,* 130 Wn.2d at 414 (citing *Meat Cutters Local No. 494 v. Rosauer's Super Mkts., Inc.,* 29 Wn.App. 150, 154-55, 627 P.2d 1330 (1981)).

Given the broad language of the agreed issue statement here, as in the *Kittitas County* case, the type of documentary evidence and testimony adduced at the arbitration hearing, and the strong presumption in favor of

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[109] *Klickitat County, supra.*

arbitrability, the arbitrator here did not exceed his authority. In other words, the parties invited the arbitrator to consider the appropriateness of the termination and punishment case.[110]

Consequently, the County's argument that the arbitrator acted illegally is unpersuasive. Despite the fact that some jurists might agree with the arguments rendered in the Writ and the supporting declarations before the court, the only relevant question is whether the arbitrator exceeded his authority. He did not. As the state Supreme Court has commented:

> Because the arbitrator adopted an arguable interpretation of the parties' original intent, she did not expand the terms of the contract. We conclude that the arbitrator was within her authority to interpret and enforce the contract .... Regardless of whether we find this interpretation strained, we uphold it because the arbitrator did not exceed the authority given to her under the CBA.[111]

The *Clark* court continued:

> The parties are bound by their consent to have the arbitrator fashion an appropriate remedy. Courts will not overturn the arbitrator's remedy when it is drawn from the essence of the collective bargaining agreement. *United Steelworkers of Am.*, 363 U.S. 593, at 597, 4 L.Ed.2d 1424, 80 S.Ct. 1358; *see Amalgamated Transit Union Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1200 (8th Cir. 2000) (upholding arbitrator's award because the employer was "bound by its consent to have the arbitrator fashion an appropriate remedy"); *see also Mogge v. Dist. 8, Int'l Ass'n. of Machinists*, 454 F.2d 510, 513 (7th Cir. 1971)

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[110] *See Department of Agric. v. Personnel Bd. supra*, 65 Wn.App. 508, 516, 828 P.2d 1145 (1992).
[111] *Clark County Pub. Util. Dist. No. 1, supra* at 247-48.

> (upholding back pay past the expiration of the collective bargaining agreement in part because parties had stipulated to the arbitrator's authority to fashion a remedy).[112]

Ultimately, this approach returns to the basic policy considerations underlying the arbitration of labor disputes. As noted by our Supreme Court:

> Finally, we note that the procedural posture of this case underscores the importance of an extremely limited standard of review because it highlights the importance of supporting the finality of bargained for, binding arbitration. When parties voluntarily submit to binding arbitration, they generally believe that they are trading their right to appeal an arbitration award for a relatively speedy and inexpensive resolution to their dispute. *See Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen & Helpers,* 746 F.2d 1316, 1322 (7th Cir. 1984). [I]n the present case, arbitration has not resulted in an expeditious, inexpensive resolution. Since the arbitrator made [his] award, ... issues stemming from it have reached ... court twice, undoubtedly at great expense to the parties. These circumstances reinforce our view that binding arbitration awards are not subject to being vacated by courts, except in the very limited circumstances we outline above.[113]

In other words,

> In discussing the courts' limited role in reviewing the merits of arbitration awards, [the US Supreme Court has] stated that "'courts . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.'" *Id.* at 37 (quoting *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 568, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960)). When the judiciary does so, "it usurps a function which . . . is entrusted to the arbitration tribunal." *Id.* at 569; *see also Enterprise Wheel & Car Corp., supra,* at 599 ("It is the arbitrator's

[112] *Id.* at 249.
[113] *Clark County Pub. Util. Dist. No. 1, supra* at 246-47.

construction [of the agreement] which was bargained for . . . "). Consistent with this limited role, we said in *Misco* that "even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result." 484 U.S. at 40-41, n. 10. That step, [the Court] explained, "would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for" in their agreement. *Ibid.*[114]

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[114] *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509-510, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) cited with approval in *E. Associated Coal Corp v. United Mine Workers, Dist. 17,* 531 U.S. 57, 61-62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000). This should be distinguished from the Guild's concerns regarding the scope of the Award to be enforced. The key provisions of the Award, as read to the Court by the County, say:

Remedy

Since the Grievant was not fit for duty at the time of his discharge, he should be made whole by retroactively placing him in the position that he would otherwise have been in. Specifically, Deputy LaFrance should be allowed to access any benefits that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by this Collective Bargaining Agreement. Since Deputy LaFrance was (and possibly still is) incapacitated he is not entitled to back pay *per se,* but may keep any Unemployment Insurance benefits for which he is monetarily eligible.

The Grievant should also be allowed to return to full duty upon passing independent psychological and physical fitness-for-duty exams as normally utilized by the Employer. The retroactivity of the return of the Grievant to regular status is not an issue in this case due to the lengthy continuance requested by the Guild and necessitated by Deputy LaFrance's heart attack.

VIII. CONCLUSION

The grievance is granted in part and denied in part. The County's allegations of misconduct by former Deputy Brian LaFrance are upheld but the penalty imposed is reduced to three final written warnings.

IX. AWARD

The US Supreme Court explained:

> [B]oth employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language, including such words as "just cause." *See Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960). They have "bargained for" the "arbitrator's construction" of their agreement. *Ibid.* And courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances. *Id.* at 596. Of course, an arbitrator's award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987). "But as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision." *Ibid.; see also Enterprise Wheel, supra,* at 596 (the "proper" judicial approach to a labor arbitration award is to "refuse . . . to review the merits").

A constitutional writ will not stand. The Court was correct in denying a writ to the Cross-appellants on constitutional grounds.

> The grievance is granted in part and denied in part. Kitsap County has met its burden of proof in showing that Brian LaFrance was disciplined with just cause. The discharge of the Grievant is rescinded and he is allowed access to any benefits available to disabled employees as of his date of discharge. The Employer may impose Final Written Warnings for Untruthfulness, Incompetent Performance, and, Failure to Follow Rules and Directives.

Award, dated July 17, 2004 (emphasis added). Thus, the Award provides for reversal of the discharge; restoration of "good standing"; access to any benefits "that an officer in good standing could have accessed as of his date of discharge including sick leave, disability benefits, or any other benefit provided to disabled employees covered by [the] Collective Bargaining Agreement;" and fitness exams "as normally utilized by the Employer" before Deputy La France can return to "full duty."

D. Statutory Certiorari is Not Available Here.

The Cross-Appellants also sought a statutory writ, although they seem to have dropped their appeal on that basis. Granted, RCW 7.16.040 entitled "Grounds for Granting Writ" reads:

> A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

A court will issue a statutory writ of review, pursuant to Chapter 7.16 RCW, if the petitioner can show that (1) an inferior tribunal or officer (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no other avenue of review or adequate remedy at law.[115] Yet, if any of the factors is absent, then there is no basis for superior court review.[116]

Moreover, Washington courts have held that the statutory writ is not available in labor arbitrations. For example, in *Clark County PUD No.*

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[115] See RCW 7.16.040; *Clark County PUD No. 1 v. Wilkinson, supra; Bridle Trails supra.*

[116] *Clark County PUD No. 1 v. Wilkinson, supra; see Bridle Trails, supra* at 252; *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518, 532, 79 P.3d 1154 (2003); *see also Raynes v. City of Leavenworth,* 118 Wn.2d 237, 821 P.2d 1204 (1992) (statutory writ granted only when all four factors are present).

1 v. Wilkinson, a public employment arbitration, the state Supreme Court noted:

> In the present case, review by certiorari is appropriate initially because there is no statutory mechanism for judicial review of public employment labor arbitrations. Although RCW 41.56.122(2) provides for binding arbitration in public employee labor disputes, it does not provide for judicial review of such decisions. In addition, chapter 49.08 RCW, which governs general labor disputes[, and is cross-referenced in RCW 7.16.010] does not apply to public employment arbitrations. RCW 41.56.125. Furthermore, RCW 7.04.010, Washington's general arbitration statute, does not apply to agreements between employers and employees unless specifically provided in the labor agreement. *See Grays Harbor County [v. Williamson],* 96 Wn.2d [147,] 152 [, 634 P.2d 296 (1981)]. The CBA here did not incorporate chapter 7.04 RCW by reference.[117]

Similarly, in *Grays Harbor County,* another public employment arbitration, the Court rejected a statutory writ outright. As it concluded:

> Since the action did not involve an inferior tribunal, board or officer; may not have involved the exercise of a judicial function; and was subject to a meaningful review, the trial court lacked jurisdiction to grant certiorari under RCW 7.16.040.[118]

Even if there is no meaningful review of the decision, as voluntarily elected by the employer and union in collective bargaining, the action still does not involve an inferior tribunal, does not involve the

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[117] *Clark County PUD No. 1 v. Wilkinson, supra* at 847. RCW 7.04.010 specifically eliminates application of the general arbitration statute to agreements between employers and employees unless specifically provided in the labor agreement. *See Greyhound Corp. v. Division 1384, Amalgamated Ass'n of St. Employees,* 44 Wn.2d 808, 812-13, 271 P.2d 689 (1954).

[118] *Grays Harbor County v. Williamson,* 96 Wn.2d 147, 154, 634 P.2d 296 (1981).

exercise of a judicial function, and the lack of jurisdiction or illegality alleged is clearly contested. Lacking two or three of the four necessary factors underlying certiorari under Chapter 7.16 RCW, no statutory review is available.[119]

E. Issuance of a Writ to Raise a Public Policy Concern is Unwarranted Here.

The Cross-Appellants do not seek a "public policy" writ *per se*, but many of their arguments seem to arise from that premise. Both State and Federal courts recognize a "public policy" basis for the review of an arbitration award.[120] Yet, as noted and limited by the US Supreme Court:

> We must then decide whether a contractual reinstatement requirement would fall within the legal exception that makes unenforceable "a collective bargaining agreement that is contrary to public policy." *W. R. Grace & Co.[, supra]*. The Court has made clear that any such public policy must be "explicit," "well defined," and "dominant." *Ibid.* It must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Ibid.* (quoting *Muschany v. United States,* 324 U.S. 49, 66, 89 L. Ed. 744, 65 S. Ct. 442 (1945)); *accord, Misco, supra,* at 43. And, of course, the question to be answered is not whether [the alleged act] itself violates public policy, but whether the agreement to reinstate him does so. To put the question more specifically, does a contractual agreement to reinstate [Deputy La France] with specified conditions ... run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference

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[119] *Clark County PUD No. 1 v. Wilkinson, supra; see Bridle Trails, supra; Malted Mousse, supra; see also Raynes, supra.*

[120] *See W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 76 L. Ed. 2d 298, 103 S. Ct. 2177 (1983); *See Local Union No. 77, IBEW v. Public Utility Dist. No. 1,* 40 Wn.App. 61, 66, 696 P.2d 1264 (1985).

> to positive law and not from general considerations of supposed public interests? *See Misco, supra,* at 43.[121]

As a result, this is an extremely limited exception.[122] It contrasts the ability of the employer to make policy arguments to its appointed arbitrator with the ability of the employer to raise new policy issues after the award has been rendered. If left unchecked, this exception could swallow the rule. The arguments made by the County here represent its attempt to second-guess the award and invite the court to reweigh the arbitrator's conclusions. As argued above, this is to be avoided. As the US Supreme Court noted:

> both employer and union have agreed to entrust this remedial decision to an arbitrator. We cannot find in the Act, the regulations, or any other law or legal precedent an "explicit," "well defined," "dominant" public policy to which the arbitrator's decision "runs contrary." *Misco*, 484 U.S. at 43; *W. R. Grace*, 461 U.S. at 766. We conclude that the lower courts correctly rejected [the employer's] public policy claim.[123]

The *W.R. Grace & Co,* decision also precludes statutory certiorari in this case.[124]

In this regard, the theory that a law enforcement officer must be discharged whenever he lies, or even that the prosecutor gets to make de

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[121] *E. Associated Coal Corp., supra* at 62-63.
[122] *Id.* at 63.
[123] *E. Associated Coal Corp., supra* at 67.
[124] *See Local Union No. 77, IBEW, supra.*

facto employment decisions regardless of an employee's civil rights is preposterous.

First, it should be noted that law enforcement employees bargain with the Sheriff on behalf of the County. It has never been suggested in either past practice or written policy, that there is some over-arching restriction on "just cause" which requires the Sheriff to terminate employees just because the prosecutor says so. A finding of immaterial dishonesty is not some sort of magic bullet that transcends the negotiated disciplinary rules. In that regard, the arbitrator must be fully empowered to assess the degree of dishonesty involved, and to mitigate the penalty if it is appropriate to do so. Rules against dishonesty are hard to define and often disregarded. For example, among many other examples, people will tell technical "untruths" indicating that they are busy or asleep while at home, when they are not so disposed; indicating that they have a "headache" when they do not; indicating that they are "okay" when they are troubled; indicating that they caught a bigger fish than they did; and indicating that "the check is in the mail" when it is not. Typically, these minor "misrepresentations" do not hurt anybody and are incapable of precise verification; they might be untruthful, but the "lie" is harmless and insignificant. It needs to be assessed. Not punished regardless, as the Cross-Appellants would have one believe.

Second, there is no exception in the civil rights requirement that employees receive full post-termination hearings which allows an employer to terminate an employee after he or she has been reinstated by an arbitrator.[125] These hearings recognize and implement the rule that Washington law enforcement employees have a protected property interest in their employment. Whenever a party has a property right in continued employment, the State cannot not deprive him or her of this property without due process.[126] As noted by the *Loudermill* Court:[127]

> The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett v. Kennedy*, [416 U.S. 134, 94 S.Ct. 1633; 40 L.Ed.2d 15 (1974)] at 167 (POWELL, J., concurring in part and concurring in result in part); see id., at 185 (WHITE, J., concurring in part and dissenting in part).

It is illegal for employees with those attributes to be summarily dismissed; it removes "just cause" from the penalty assessment phase of the proceedings.

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[125] *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).
[126] *Loudermill, supra* at 538; *See Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11-12, 98 S.Ct. 1554; 56 L.Ed.2d 30 (1978); *Goss v. Lopez,* 419 U.S. 565, 573-574, , 95 S.Ct. 729; 42 L.Ed.2d 725 (1975).
[127] *Loudermill, supra* at 541.

Third, it is improper as a matter of procedure for an employer to just sit on its theory of discharge until the Award is issued, to not make it an issue in the arbitration hearing, and then to fire the employee anyway if it does not like the arbitrator's reinstatement decision. Yet that is precisely what the employer did here. A plaintiff is not entitled to an extensive or formal pre-termination hearing *if* there are adequate post-termination procedures.[128] Where the Cross-Appellants have undermined the post-termination proceeding by taking actions at odds with the Award itself, they have deprived the aggrieved employee of his or her right to a fair hearing.

F. In any Event, the Issuance of the Writ is Discretionary.

While the issuance of the Writ is arguably an abuse of discretion,[129] the decision to issue the Writ is discretionary with the Court.[130] For the reasons given, in that there is no statutory writ for labor arbitrations, and that a constitutional writ will not lie because the arbitrator's award was neither illegal, *e.g.*, without jurisdiction, nor found to be "arbitrary and capricious," the Court should exercise its own discretion to refuse to issue the Writ.

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[128] *See Benavidez v. Albuquerque,* 101 F.3d 620, 627 (10th Cir. 1996) ("Because it is followed by post-termination proceedings, the pre-termination hearing is not meant to resolve definitively the propriety of the discharge, but only to determine whether there are reasonable grounds to believe the charges are true and the action is correct.")

[129] Certiorari is an *extraordinary* remedy, and its assurance guarded against abuse. *First Nat'l Bank v. Tiffany,* 40 Wn.2d 193, 242 P.2d 169 (1952).

[130] *North Bend Stage Line v. Department of Pub. Works,* 170 Wash. 217, 16 P.2d 206 (1932).

G. The Proposed Writ is Untimely.

Finally, a petition for a writ of certiorari must be filed within a "reasonable time."[131] With regard to a statutory writ, as the Court of Appeals stated: "the time within which [statutory] certiorari must be applied for is determined by reference to the time prescribed by statute or court rule for bringing an appeal"'[132] Appeals are to be filed within 30 days, well beyond the more than 1 year in which this case was filed.[133]

By contrast, constitutional writs of certiorari need not be sought within the analogous time ordinarily allowed by statute or rule for filing an appeal. For example, in *Hough*, the court held that "a 30-day [statutory] limitation was inapplicable to petitions" for a writ of certiorari.[134] However, the state Supreme Court has held that the time for filing a constitutional writ is not limitless. To the contrary, any unreasonable delay in seeking a constitutional writ bars issuance of the writ. Laches principles appropriately indicate the reasonable time for seeking a constitutional writ.[135] Laches, an equitable doctrine, protects the parties from prejudicial delay in seeking the writ while preserving a court's

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[131] *Akada v. Park 12-01 Corp.*, 103 Wn.2d 717, 695 P.2d 994 (1985); *Clark County PUD No. 1 v. Wilkinson, supra* at 847; *see also Hough v. Washington State Personnel Bd.*, 28 Wn.App. 884, 626 P.2d 1017 (1981) (determining the court lacked jurisdiction, it did not reach the issue of what constituted a reasonable time)

[132] *Vance v. City of Seattle,* 18 Wn.App. 418, 423, 569 P.2d 1194 (1977) cited with approval in *Clark County PUD No. 1 v. Wilkinson, supra* at 847.

[133] RAP 5.2(a).

[134] *Hough v. Wn. State Pers. Bd., supra.*

[135] *See Leschi Improvement Council v. Washington State Highway Comm'n,* 84 Wn.2d 271, 275, 525 P.2d 774, corrected, 804 P.2d 1 (1974).

discretion to grant or deny the writ.[136] Application of the doctrine is on a case-by-case basis.[137]

Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay.[138] In determining whether the delay was inexcusable, a court may look to a variety of factors including similar statutory and rule limitation periods. But the main component of the doctrine is not so much the period of delay in bringing the action, but the resulting prejudice and damage to others.[139] A court should not presume prejudice merely from the fact of a delay.[140] The burden is on the defendant to show whether and to what extent he or she has been prejudiced by the delay.[141]

Here the County argues that it acted promptly upon learning that Deputy La France was fit for duty. This argument ignores the County's wrongful failure to place Deputy La France on administrative leave effective upon the reversal of his discharge in 2001, or upon the fitness for duty clearance in 2003. This argument also ignores the failure of the

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[136] *See Vance,* 18 Wn.App. at 421 n.2 (application for writ of certiorari 'calls for the exercise of judicial discretion and consideration of equitable principles.').
[137] *See Leschi,* 84 Wn.2d at 275.
[138] *See Brown v. Continental Can Co.,* 765 F.2d 810, 814 (9th Cir. 1985).
[139] *See Pierce,* 62 Wn.2d at 332; *see also Vance,* 18 Wn.App. at 425 (noting that laches is an equitable doctrine and its application does not depend solely upon the passage of time alone, but also upon the effects of delay upon the relative positions of the parties) (quoting *Holmberg v. Armbrecht,* 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743, 162 ALR 719 (1946)).
[140] *Vance,* 18 Wn.App. at 425
[141] *Id. See also, Clark County Pub. Util. Dist. No. 1 v. Wilkinson, supra* at 849.

County to raise its prosecutor's claims under *Brady v. Maryland* to justify its discharge in the arbitration. Assuming one overlooks both the three and one-half year delay in the proceedings, and the one and one-half year delay in making the argument itself, the Writ might be viewed as timely. Where was the *Brady* argument in the arbitration when the propriety of the discharge question was at issue?" Where was the *Brady* argument when the discharge itself was reviewed in the discharge investigation or replied to and assessed in the resulting *Loudermill* hearing?

The effect on the defendants is clear from the record. First, all parties have been deprived of a final and binding resolution of this case in arbitration, a fair investigation and a proper chance to evaluate the charges in a *Loudermill* hearing with the Chief. Second, although the Guild and the employer agreed to it, a "speedy" resolution of this employment dispute has been lost forever. There are more specific losses. The hearing and its record are long over. Several of the witnesses called have left the job or the area or both, most notably the key prosecution witness, the Deputy's immediate supervisor, Sgt. Jim Harris, and the employer's decision-maker, Chief Mike Davis. The Deputy was deprived of an opportunity to cross-examine employer witness against him. Deputy La France was seen twice for fitness for duty, cleared, and eventually returned to work in patrol for about three months before these issue were

raised. He was then put back on administrative leave but paid to stay home.

Taken together, these gross changes in the *status quo,* each of which changes the nature of the case to be presented in arbitration, are the essence of prejudice and damage which underlie the doctrine of laches and preclude the fair and proper grant of certiorari. The Writ is untimely.

CONCLUSION

Taking all of its arguments collectively, the appellants jointly seek reversal of the trial court's award of summary judgment for the respondents, the grant of a summary judgment in their favor, and a denial of the cross-appellant's writ.

Respectfully submitted,

CLINE & ASSOCIATES

By: _____
George E. Merker, WSBA #11124

Attorneys for Appellant Guild

PROOF OF SERVICE

I, George E. Merker, hereby declare, under penalty of perjury of the laws of the State of Washington that:

1. On August 15, 2006, at 1620 p.m., Brian La France and I caused two copies of the "Joint Reply Brief of Appellants/Joint Response Brief of Cross-Respondents" herein to be to be served upon the Respondents in care of their counsel of record, via deposit of in the US Mail, postage prepaid.

2. On August 15, 2006, at 1620 p.m., Brian La France and I caused two copies of the "Joint Reply Brief of Appellants/Joint Response Brief of Cross-Respondents" herein to be to be filed with the Court, via deposit in the US Mail, postage prepaid.

DATED this 15th day of August, 2006, at Bainbridge Island, Washington.

George E. Merker

raised. He was then put back on administrative leave but paid to stay home.

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CLINE & ASSOCIATES

By: _____
George E. Merker, WSBA #11124
Attorneys for Appellant Guild

DEPUTY BRIAN LA FRANCE and JANE DOE LA FRANCE, and the marital community composed thereof,

By: _____
Brian La France, *pro se*